

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ZINUS INC., a California Corporation,  
Plaintiff,  
v.  
SIMMONS BEDDING CO, a Delaware  
Corporation, and DREAMWELL, LTD, a  
limited liability company of Nevada  
Defendants.

Case No.: C 07- 3012 PVT

**ORDER FOR SUR-REPLY BRIEF TO  
SIMMONS' MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM**

DREAMWELL, LTD, a limited liability  
company of Nevada )  
Counterclaimant )

V.

ZINUS INC., a California Corporation,  
Counterclaim Defendant

Plaintiff Zinus Ltd. (“Zinus”) manufactures and sells a bedding product called “Mattress-in-a-box.” The “Mattress -in-a-box” can be sold in a transportable package at mass retail stores. Defendant Simmons Bedding Co. (“Simmons”) is a manufacturer of bedding products. Defendant Dreamwell, Ltd (“Dreamwell”) is a wholly owned subsidiary of Simmons and owns the rights to U.S. Patent No. Re. 36,142, entitled Method of Packaging Resiliently Compressible Articles (“the ‘142 patent”). Dreamwell also owns the rights to the federal trademark

1 "POCKET COIL ." As part of a pilot program, Wal-Mart sold the Zinus "Mattress -in-a-box"  
2 product in some of its stores in late 2006 and early 2007. In March of 2007, Simmons and Zinus  
3 entered into a Confidentiality and Non-Disclosure Agreement prior to a visit by Simmons to the  
4 Zinus factory in China. In May, Dreamwell sent Zinus and Wal-Mart "cease and desist" letters,  
5 claiming that the "Mattress -in-a-box" infringes the '142 patent and the "POCKETCOIL"  
6 trademark.

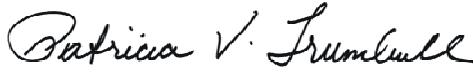
7 Zinus filed the instant complaint for Declaratory Judgment of Non-Infringement and  
8 invalidity of the '142 patent, Violation of the Lanham Act, 15 U.S.C. § 1125(a) by false  
9 advertising, and breach of the Confidentiality and Non-Disclosure contract.

10 On August 24, 2007, Simmons filed a Motion to dismiss for failure to state a claim.  
11 Simmons argued that Zinus had not stated a claim for False Advertising against it because the  
12 only communication at issue was authored by Defendant Dreamwell, Ltd ("Dreamwell"), a  
13 wholly owned subsidiary of Simmons. Simmons also argued that Zinus had failed to allege all  
14 of the elements for a claim of breach of contract. In Reply, Simmons asserted for the first time  
15 that the cease and desist letter could not form the basis of the false advertising claim under the  
16 Lanham act because the letters were not statements "in commercial advertising or promotion" as  
17 required by the act. Simmons also argued for the first time in Reply that Zinus' allegation of  
18 partial performance of the Confidentiality and Non-Disclosure Agreement is insufficient to state  
19 a claim for breach of the contract.

20 Because these claims were first raised in Reply, IT IS HEREBY ORDERED that no later  
21 than October 17, 2007, Zinus shall file a Sur-Reply brief addressing only these two issues.

22  
23 IT IS SO ORDERED

24 Dated: October 9, 2007

  
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PATRICIA V. TRUMBULL  
United States Magistrate Judge